88-371

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

STATE OF VERMONT,
Petitioner,

v.

RICK A. PRESTON,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

———

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QUESTION PRESENTED

Whether assignment of counsel at an arraignment, in satisfaction of Sixth Amendment requirements, automatically invokes a defendant's Fifth Amendment right to counsel, thereafter foreclosing any later attempt at interrogation of the defendant in an unrelated homicide investigation?

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No. ——

STATE OF VERMONT,

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v.

RICK A. PRESTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

OPINION BELOW

The opinion of the Supreme Court of Vermont is reported at 149 Vt. ——; it also appears at 543 A.2d —— (1988). The opinion is reprinted in Appendix A.

JURISDICTION

The Supreme Court of Vermont rendered its initial decision, affirming the trial court's grant of respondent's motion to suppress, on April 29, 1988. After a timely motion for reargument was filed by respondent, the Court reissued its decision on July 1, 1988 in slightly modified form with the entry order of affirmance unaffected. App. 9a.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

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[1] A motion for reargument was timely filed by the State of Vermont based on the inclusion of new language in the July 1st de-

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence (sic) to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Law enforcement officials were unable to locate the respondent, who was wanted for questioning regarding the homicide of sixty-six year old man with whom he had resided. Since respondent had failed to appear for arraignment on an unrelated assault charge, an arrest warrant was issued and entered onto the National Crime Information Center computer with an indicaion that Vermont would extradite respondent. App. 2a-3a.

Respondent was located and arrested in Volusia County, Florida where he was arraigned and held in the local correctional facility as a fugitive from justice on the assault charge. At arraignment on the fugitive charge respondent requested counsel. App. 11a. Respondent later

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cision. This motion is still pending. Because it is unclear whether the state Supreme Court will view this second motion as tolling the running of the time period prescribed by Supreme Court Rule 20, the petitioner files this petition now in order to preserve its right to seek further review. The petitioner will immediately advise the Court of any decisions by the state Supreme Court.

testified that he sought counsel in order to receive "some legal advice on the matter before I went up against the judge." App. 20a. Respondent never met with Florida counsel, App. 20a, nor was he ever interrogated in connection with the assault offense.

Law enforcement officers from Vermont arrived in Florida to interrogate the respondent, still in custody as a fugitive from justice, concerning the unsolved homicide. App. 12a. The respondent received and waived properly administered *Miranda* warnings. At no time did he request counsel to assist him during these interrogation sessions. The respondent confessed to the killing and was returned to Vermont to face a charge of first degree murder. App 4a.

Prior to trial respondent filed a motion to suppress all written and oral statements made by him to Vermont law enforcement officers during the interrogation sessions which took place while he was in custody in Volusia County Correctional Center in Florida, while he was in transit after he waived extradition and was returning to Vermont; and while he was in custody in Vermont. These statements were made over a three-day period in March, 1986.

The trial court granted the respondent's motion to suppress after it determined that defendant's confession was not voluntary. The State sought review by interlocutory appeal to the lower court's decision, since the suppression of respondent's confessions was dispositive of the case. Without the respondent's statements, the State lacked vital proof regarding the elements of the offense.

The Vermont Supreme Court eschewed voluntariness as a basis for excluding the confession, holding instead, based solely on respondent's Fifth Amendment right to counsel, that the police erred when they interrogated the respondent. "[U]nder the 'bright line' rule enunciated in

Edwards and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid." App. 5a. Relying on *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 107 S.Ct. 3240 (1987), the Vermont Supreme Court determined that a defendant who accepts counsel at an arraignment for one offense is invoking his Fifth Amendment right to counsel regarding police interrogation for other, unrelated crimes.

REASONS FOR GRANTING THE WRIT

I. Clarification Is Required As *Edwards v. Arizona* Has Been Extended Beyond Its Intended Meaning.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court reaffirmed *Miranda v. Arizona*, 384 U.S. 436 (1966), by holding that an assertion of right to counsel during custodial questioning by a suspect brings all further questioning by law enforcement officials to a halt unless and until the suspect initiates contact. This Court has recently emphasized that "*Edwards* rested on the view that once 'an accused . . . *ha*[*s*] *expressed his desire to deal with the police* only through counsel' he should 'not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.'" *Patterson v. Illinois*, —— U.S. ——, 108 S.Ct. 2389, 2394 (1988) (emphasis supplied), relying on *Edwards*, *supra*, at 484-85. As the Court cogently expressed in *Patterson*, "preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny. . . ." The Court acknowledged that suspects are otherwise free to make decisions regarding their cooperation with the police.

The Court has not issued any opinion on the scope of the rights implicated by a defendant's request for appointment of counsel. *Michigan v. Jackson*, 475 U.S. 625, 630 n. 4 (1986) (*Edwards* was applied to exclude

defendant's statements obtained in violation of his Sixth Amendment right to counsel). The Court has never extended *Edwards* to situations where counsel was never requested or sought *during custodial interrogation.* See, *Michigan v. Jackson, supra,* at 639 n. 2 (Rehnquist, J., dissenting). Petitioner asserts that nothing requires this extension constitutionally and that the Court must resolve this unanswered question to prevent unwarranted applications of *Edwards.*

This Court has recently issued its decision in *Arizona v. Roberson,* —— U.S. ——, 108 S.Ct. 2093 (1988). There, recognition was again given to "the prophylactic protections that the *Miranda* warnings provide to counteract the "inherently compelling pressures' of custodial interrogation. . . ." *Arizona, supra,* at 2097. The decision expanded the *Edwards* principles to an unrelated separate investigation involving custodial interrogation. The Court held that a suspect may not be interrogated in the absence of counsel once he has asked to speak with a lawyer in another criminal matter. These *Miranda* goals are implemented to protect the accused who believes that he is not capable of undergoing such questioning without advice of counsel. When no such showing appears, *i.e.,* when a suspect, never interrogated at all, feels he can handle himself during questioning and agrees to speak with the police after proper *Miranda* warnings are administered, assignment of counsel at arraignment on a different cause should not trigger a Fifth Amendment right to counsel that bars proper police investigation. Such an outcome would stretch *Edwards* beyond its logical limits.

II. The Importance Of The Question Presented Requires Acceptance Of The Petition.

Petitioner's question presents an important area of law requiring acceptance and decision by this Court. While the Court has issued numerous decisions distinguishing

the purpose inherent in each right to counsel,[2] one derived from the Fifth Amendment and the other found in the Sixth Amendment, courts continue to appear befuddled in their decisions. Simply put, the right to an attorney attaches once adversial judicial proceedings have commenced, whether or not the defendant has voiced a request for assistance. *United States v. Gouveia*, 467 U.S. 180, 188 (1984). Assignment of counsel guarantees the "core purpose" of the Sixth Amendment, i.e., to assure aid during the trial process.

The act of asking for an attorney does not convert a Sixth Amendment right to a Fifth Amendment protection. The Fifth Amendment right to counsel attaches only if an accused is in police custody and subjected to *police interrogation* or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291 (1980). The right to counsel in a Fifth Amendment sense does not automatically attach when the other and separate Sixth Amendment right to counsel comes into being. Nor does the Fifth Amendment right to counsel block completely any attempt at interrogation when an accused is in custody. The right, of course, provides protections conveyed by *Miranda* warnings which safeguard an accused while at the same time allowing an educated waiver of rights, including the right to counsel. But a prior Sixth Amendment right should not be allowed to thwart properly conducted police investigation and concomitant informed decision-making by the same accused during a later and wholly unrelated interrogation.

III. Conflict Exists Between Circuit And State Court Decisions.

Federal circuit courts are sharply divided in their decisions concerning the extent of rights conferred by the assignment of counsel at arraignment. Because of the

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[2] For example, see, *Michigan v. Jackson*, *supra*, at 633, n.7; *Rhode Island v. Innis*, 446 U.S. 291, 300, no. 4 (1980).

lack of uniformity created by these contradictory decisions, law enforcement officers are uncertain about how to proceed in criminal investigations. Courts also experience difficulty in deciding cases due to shifting legal consensus.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), cert. denied, 107 S.Ct. 3240 (1987), the Seventh Circuit fashioned a decision, relied on by the Vermont Supreme Court, which extended this Court's ruling in *Edwards*. The circuit court opined that because Espinoza invoked his Fifth Amendment right to counsel at his arraignment on the weapons charge, the state was barred from initiating an interrogation of Espinoza without counsel concerning any crime for as long as he remained in continuous police custody. Despite the fact that the defendant's first and only invocation of his right to counsel occurred at arraignment, the assignment of counsel conferred a continuing Fifth Amendment benefit at an interrogation for a distinctly different offense. *United States v. Campbell*, 721 F.2d 578 (6th Cir. 1983), reaches this same conclusion as do *Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986) and *Silva v. Estelle*, 672 F.2d 457 (5th Cir. 1982).

At least as many courts have reached exactly the opposite conclusion. Other federal courts have demonstrated a distinctly different interpretation regarding a request for counsel during court proceedings. A Fourth Circuit panel held that the *Edwards* rule did not apply to bar police-initiated interrogation even after defense counsel had been retained on another charge. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988). The decision specifically rejected the reasoning employed by the Seventh Circuit in the *Espinoza* case. "Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances." *Butler, supra*, at 259. Simi-

lar results were obtained in *Boles v. Foltz*, 816 F.2d 1132, 1135 (6th Cir. 1987) (defendant did not invoke his Fifth Amendment right to counsel when he stated that he wanted his attorney present at the preliminary hearing; "where it is clear that the defendant's request is for something other than the presence of an attorney during interrogation, the request should be so construed."); *Collins v. Francis*, 728 F.2d 1322 (11th Cir. 1984) (defendant's request for counsel at arraignment fails to indicate defendant would deal with police only through a lawyer; relying on the literal language in *Edwards* and *Fare v. Michael C.*, 442 U.S. 707, 717-18 (1979), for counsel in the Fifth Amendment sense to attach there must be police interrogation) and *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982) (defendant never requested the assistance of counsel with respect to custodial interrogation; appointment was intended to assist defendant in further judicial proceedings). Additional examples of conflict among the circuit courts appear in *Jurek v. Estelle*, 623 F.2d 929, 939 (5th Cir. 1980) (en banc decision relying in pertinent part on *Blasingame v. Estelle*, 604 F.2d 893 (5th Cir. 1979)) and in *Blasingame, supra.* (request for attorney at arraignment does not suggest that "later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.' ", relying on *Nash v. Estelle*, 597 F.2d 573 (5th Cir. 1979) (en banc)).

State court decisions also illustrate division in the law. In *Currie v. State*, 512 N.E.2d 882 (Ind. App. 4 Dist. 1987), the court found that the *Edwards* rule applied after the defendant requested counsel at a probate cause hearing. In contrast, the Court is directed to *Ross v. State*, 326 S.E.2d 194, 199 (Ga. 1985) and *Tomlin v. Texas*, 690 S.W.2d 5, 8 (Tex. App. 9 Dist. 1984), for examples of decisions which reject defense arguments that a request for counsel before the court is equivalent to a request for counsel during interrogation.

IV. The Decision Below Is Erroneous.

The decision of the Vermont Supreme Court is erroneous. The court wrongly presumed that the defendant was invoking both his Sixth and Fifth Amendment rights to counsel when the defendant applied for counsel at the arraignment on the fugitive from justice charge. There was no showing that respondent felt unable to deal with the pressures of interrogation. In fact, respondent had not yet been interrogated; there was no basis on which to assume the assignment of counsel was intended to assist respondent during the rigors of interrogation. Indeed, he testified at the suppression hearing that "the main reason (he sought counsel) was for someone to talk to and to give me some legal advice on the matter before I went up against the judge." App. 20a. The Vermont Supreme Court's decision completely overlooks the factual circumstances at the time counsel was assigned. In *Patterson v. Illinois*, *supra*, at 2397-98, the Court brings its common sense to the analysis when it scrutinizes the purpose a lawyer might serve at that particular stage in the proceedings. The purpose to be served at the arraignment in Florida related solely to Sixth Amendment guarantees. The request for counsel was not related to the Fifth Amendment.

From a legal standpoint there is no reason to extend the *Edwards* rule to a situation where the accused has never expressed an unwillingness to respond to police interrogation. While respondent's request for counsel at arraignment effectively bars questioning without the presence of counsel on Sixth Amendment grounds, there is no justification for foreclosing police investigation of a separate crime in the absence of a request for counsel during interrogation. Where the accused has never expressed an inability to deal with the police and where there has been no repeated "badgering" by the police, such a decision forecloses, without a constitutional basis,

proper and necessary police work to the detriment of public safety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant the petition for a Writ of Certiorari to review the decision of the Vermont Supreme Court.

Respectfully submitted,

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Dated: August 29, 1988

APPENDICES

APPENDIX A

SUPREME COURT

May Term, 1987

No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

On Appeal from
District Court of Vermont,
Unit No. 3, Washington Circuit

(Filed July 1, 1988)

Alan W. Cook, J.

Jeffrey L. Amestoy, Attorney General, and David Tartter, Assistant Attorney General, Montpelier, for plaintiff-appellant.

Stephen S. Blodgett and Paul S. Volk of Blodgett & Watts, Burlington, for defendant-appellee.

Present: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), Keyser, J. (Ret.) and Costello, D.J. (Ret.), Specially Assigned

COSTELLO, D.J. (Ret.), Specially Assigned. On January 20, 1986, Frank Evans was found murdered in his Barre apartment. While in custody on a unrelated charge, defendant confessed to the crime. He later filed a motion seeking to have his confession suppressed, and the district court granted the motion, ruling that his confession was involuntary and that the purported waiver of his Fifth Amendment rights was invalid. The state brought this interlocutory appeal pursuant to V.R.A.P. 5(b), and we affirm.

The trial court's detailed findings of fact describe the following sequence of events. An investigation team was formed soon after the murder, consisting of the Washington County state's attorney, an investigator from that office, and detectives from the Barre City police department and the Washington County sheriff's department. Defendant, who had resided with the victim, was regarded as the principal suspect, but he could not be located. The investigating team then became aware of unrelated, simple assault charges that had been pending against defendant since a New Year's Eve fracas in Montpelier. The assault citation required defendant to appear in court for arraignment on February 3, 1986, and the team planned to make contact with him at that time. Because the team wished to question defendant in a noncustodial setting and without the presence of counsel, the state's attorney decided not to file the information and affidavit regarding the assault charge.

Defendant failed to appear for the scheduled arraignment, however, and efforts to locate him continued to be unavailing. The team decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding defendant and questioning him regarding the homicide. An information was filed on February 7, 1986, and a warrant was issued based on his earlier failure to appear. An investigator from the state's attorney's office circulated a nationwide "wanted

person" bulletin, using the National Crime Information Center (NCIC) computer.

On March 13, 1986, defendant was arrested in Florida and arraigned as a fugitive from justice. At arraignment on this charge he requested counsel, and the court appointed a public defender. The Vermont investigation team was informed of the arrest and immediately left for Florida to interrogate him. Upon arrival, the team was informed that defendant had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him.

A Barre County police detective and the Washington County sheriff met with the defendant, who was still in custody, on March 15, 1986, two and one-half days after his arraignment. Defendant had yet to consult with his appointed attorney, although he had requested such a meeting once in writing and at least once orally.

The two police officers began their interrogation with amicable conversation about defendant's travels to Florida and about mutual acquaintances in Vermont. Forty minutes after they began questioning him, the officers read a *Miranda* warning. Defendant was asked if he understood each right after it was read to him, and he indicated that he did. Defendant then orally agreed to waive those rights, and the interrogation proceeded.

Approximately thirty minutes after the *Miranda* warning was given, defendant was asked about the Evans murder. At no time until this point, approximately one hour and fifteen minutes after confronting him, had the officers mentioned the homicide investigation. Although he initially denied the murder, defendant confessed his guilt soon after he was questioned directly about the killing. He then agreed to a taped interview, which was conducted after the two police officers consulted with the

state's attorney about the questions to be asked. The following day, March 16, 1986, defendant signed a written confession.

On March 17, 1986, defendant waived extradition and was transported back to Vermont. A second written confession was obtained on the morning after his arrival. Subsequently, he met with counsel for the first time since his arrest in Florida, and was then arraigned on a charge of first degree murder.

Defendant later filed a pretrial motion to suppress all inculpatory statements, written and oral, made to the investigating team. After a series of hearings, the trial court issued findings of fact and conclusions of law and granted defendant's motion. The ruling was based upon a "totality of the circumstances" analysis, and significant weight was assigned to the following factors: defendant's age of nineteen years, his eighth grade education, his inexperience with the criminal justice system, his isolation for more than two days prior to interrogation, and the absence of counsel. The court also emphasized the investigation team's intent to question defendant in a noncustodial, uncounselled setting and their failure to inform defendant regarding the subject matter of the questioning. The court concluded that the State had failed to prove either that defendant's *Miranda* waiver was voluntary, knowing, and intelligent or that his confession was voluntarily given. We affirm the court's ruling on the suppression motion, but we do so on other grounds.

The State argues first that the trial court erred in relying upon the factors cited in its totality of the circumstances analysis. It is unnecessary to address that contention, however, because the trial court's approach was rendered inapplicable by a single factor: defendant's request for counsel. Once a criminal defendant has invoked his right to counsel under the Fifth Amendment,*

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* The Fifth and the Sixth Amendment provide a criminal defendant with two distinct rights to counsel. No Sixth Amendment

he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). If the authorities initiate further interrogation in these circumstances, then any waiver of the defendant's right to counsel for that interrogation is invalid. *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404, 1411 (1986).

Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge and that he made further requests to see his attorney while he was incarcerated. The court's findings also indicate that, despite this state of affairs, the investigation team proceeded to interrogate him in an uncounselled setting. Therefore, under the "bright line" rule enunciated in *Edwards* and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid. In reaching this conclusion, we acknowledge that two key issues are raised by the facts of this case: (1) whether defendant invoked this Fifth Amendment right to counsel at the Florida arrignment, and (2) whether any such invocation remained effective at the subsequent interrogation.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2. 117 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3240 (1987), the Seventh Circuit resolved these same issues in the context of a markedly similar factual situation.

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analysis is included here because the constitutional right to counsel under that Amendment had not yet attached at the time of the interrogation regarding the murder. The Sixth Amendment right to counsel attaches only when a "critical stage of the prosecution" begins. *United States v. Wade*, 388 U.S. 218, 237 (1967). As the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the Fifth Amendment provides "an individual held for interrogation . . . the right to consult with a lawyer and to have the lawyer with him during the interrogation." *Id.* at 471.

There, as here, defendant Espinoza was arrested and arraigned on a relatively minor charge. He requested counsel, and a public defender appeared on his behalf at the arraignment. While Espinoza remained in custody, police investigation indicated his possible involvement in a recent homicide. In the interview that followed, Espinoza waived his rights under *Miranda* and confessed to the murder.

After Espinoza's conviction on the murder charge was affirmed on appeal, a federal district court granted a habeas corpus petition, ruling that his confession should have been suppressed. The Seventh Circuit upheld the district court's decision on Fifth Amendment grounds, and its opinion included a painstaking analysis of the very issues presented here.

First, because Espinoza did not assert his constitutional rights at the interrogation itself, the court set out to determine whether his earlier request for counsel at the arraignment constituted an invocation of his Fifth Amendment right to counsel. Citing *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404 (1986) and *Connecticut v. Barrett*, —— U.S. ——, 107 S. Ct. 828 (1987), the court rejected the state's argument that this request was no more than an assertion of Espinoza's Sixth Amendment right as an accused in that particular prosecution. *Jackson* and *Barrett* make clear, as the court explained, that a broad interpretation must be given to a defendant's request for counsel, and that a court must presume, absent evidence to the contrary, that such an individual has invoked the full extent of his constitutional right to counsel. See *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409 and *Barrett*, —— U.S. at ——, 107 S. Ct. at 823. Therefore, the *Espinoza* court reasoned, it must be presumed that a defendant who requests or accepts counsel at an arraignment is invoking both his Sixth Amendment and his Fifth Amendment rights. *Espinoza*, 813 F.2d at 123. Because the state presented no evidence indicating that

Espinoza intended to limit his invocation to the Sixth Amendment, the court concluded that his unqualified acceptance of counsel at the arraignment was an assertion, rather than a waiver, of his Fifth Amendment rights. *Id.*

The Seventh Circuit went on to decide whether this invocation at the arraignment remained effective at the subsequent, but unrelated, murder interrogation. The court first held that, once asserted, the Fifth Amendment right to counsel terminates "only when the heightened potential for state-coerced self-incrimination ends—upon the release of the individual from police custody." *Id.* at 125. The court then concluded that Espinoza's invocation of his right at the arraignment also extended to the later interrogation regarding the murder. *Id.* at 126. If the rule were otherwise, the court reasoned, then the prophylactic purpose of the Fifth Amendment would be defeated because the heightened possibility of state "overreaching" continues to exist regardless of the timing or the subject matter of custodial interrogation. Citing *Edwards v. Arizona*, 451 U.S. at 484-85, the court held that the waivers obtained from Espinoza at the murder interrogation were invalid because the state initiated the questioning.

We adopt the reasoning of the Seventh Circuit. Here, defendant asked that an attorney be appointed to represent him in dealing with the State, and he continued his efforts to consult counsel while he was being held in custody. We will not assume that defendant was in some way limiting his request for legal counsel; indeed, we must presume that defendant was invoking both his Sixth Amendment right and his Fifth Amendment right to counsel, and the State has not shown otherwise. As the Supreme Court has observed, an individual requesting counsel at his arraignment does not know which constitutional right he is invoking. *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409-10 n.7 (quoting *Michigan v. Jackson*,

421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). We hold that defendant's invocation of his Fifth Amendment right remained effective at the time of the interrogation, and that, because the State impermissibly initiated that interrogation, his purported waivers of this right were invalid.

Affirmed.

FOR THE COURT:

/s/ Edward J. Costello
EDWARD J. COSTELLO
D.J. (Ret.)
Specially Assigned

APPENDIX B

ENTRY ORDER

SUPREME COURT DOCKET NO. 87-023
JUNE TERM, 1988

STATE OF VERMONT

v.

RICK A. PRESTON

Appealed From District Court of Vermont,
Unit No. 3, Washington Circuit
Docket No. 332-3-86 WnCr

(Filed July 1, 1988)

In the above entitled cause the Clerk will enter:

After the opinion in this case had been issued, defendant moved for leave to reargue. Some minor revisions to the opinion have been made, but the entry order is not affected.

Motion denied.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Albert W. Barney
ALBERT W. BARNEY
Chief Justice (Ret.)
Specially Assigned

/s/ F. Ray Keyser
RAY KEYSER
Associate Justice (Ret.)
Specially Assigned

/s/ Edward J. Costello
EDWARD J. COSTELLO
District Judge (Ret.)
Specially Assigned

APPENDIX C

VERMONT DISTRICT COURT
UNIT II, WASHINGTON CIRCUIT

Docket No. 332-3-86 WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK A. PRESTON

STIPULATION/FLORIDA

1. On March 13, 1986, Rick A. Preston was arrested by Officer Monroe of the Ormond Beach, Florida police department.

2. Rick Preston had entered the police station seeking shelter and to report being robbed. After becoming suspicious, Officer Monroe ran a NCIC check on him. As a result of a "hit", Preston was arrested on a fugitive from justice charge arising out of the warrant for his arrest obtained in connection with the charge of simple assault.

3. He was arraigned on the charge on March 13, 1986, in the Volusia County Court. He was found to be indigent, and after requesting counsel, was appointed the services of the Volusia County Public Defender.

4. Washington County State's Attorney Terry Trono, Sheriff Ronald West, Detective Brent Curtis of the Barre City Police Department, Lawrence Dodge, Investigator for Terry Trono, Scott Vanderbush of the Barre City Police Department, and Sgt. Ronald DiVincenzi of the Vermont State Police all travelled to Volusia County on or about March 13, 1986.

5. Conversations were had by the State's Attorney and the investigating officers with local police, prosecutors and corrections personnel. As a result of these conversations, the investigating officers became aware, prior to the interrogation of the defendant, that he had been arrested on the Vermont warrant, that he had appeared before a local Judge on March 13, 1986, that he had requested and been assigned counsel on the fugitive from justice charge, and that he was being detained pending further proceedings at the Volusia County Correctional facility.

6. On March 15, 1986, Rick Preston was interrogated by Sheriff West and Detective Curtis at the Volusia County Correctional facility while in custody.

7. No contact with Rick Preston's local counsel was attempted. The officers believed that the law did not require it.

8. Prior to being advised of his rights Preston was not told that he was about to be interrogated in connection with the death of Frank Evans.

9. At no time during the interrogation was the simple assault charge mentioned.

10. Rick Preston admitted that he had killed Frank Evans during the interrogation on March 15, 1986.

11. He made a subsequent confession on March 16, 1986 after having been moved to the Volusia County Jail, again to Sheriff West and Detective Curtis.

12. On March 17, 1986, Rick Preston appeared before Judge Blount of the Volusia County Circuit Court, was advised of his rights, and waived extradition on the charge of assault.

13. Rick Preston was returned to Vermont on March 17, 1986, around midnight, by Sheriff West and Detective Curtis.

14. He was lodged on the night of his return at the Barre City lock-up. He confessed again, on ——— March 18, 1986. Rick Preston was arraigned in Barre on March 18, 1986 at approximately 3:00 P.M.

15. The following documents may be admitted into evidence:

a. Certified copy of arrest report of Officer Alfred Monroe, containing thereon judicial determinations of Judge Graziano.

b. Certified copy of Waiver of Extradition signed by Rick A. Preston.

c. Copy of NCIC entry form signed by Douglas Hoyt, typed by Holly Gavin, based on information provided by Lawrence Dodge, dated February 7, 1986.

d. Xerox copy of print out of temporary felony wanted person entry into NCIC computer. Information entered by Holly Gavin from facts provided by Lawrence Dodge on February 7, 1986.

e. Information, affidavits, citation, application for warrant, and warrant all in connection with the simple assault charge filed against Rick Preston on February 7, 1986.

f. *Vermont Criminal Information Center, Contributor Guidelines,* which describes the operations and procedures applicable to the introduction of data onto the National Crime Information Center computer.

Dated at Barre in the County of Washington and State of Vermont this 25th day of July, 1986.

RUBIN, RONA, KIDNEY & MYER

By /s/ _____
RICHARD I. RUBIN
Defendant's Attorney

STATE OF VERMONT

By /s/ _____
TERRY TRONO

By /s/ _____
DAVID E. TARTTER
Attorneys for the State

/s/ _____
RICK A. PRESTON

APPENDIX D

VERMONT DISTRICT COURT
UNIT II, WASHINGTON CIRCUIT

Docket No. 332-3-86, WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK PRESTON

STIPULATION/VERMONT

The State and the Defendant stipulate to the following facts:

1. Frank Evans was found murdered in his apartment on South Main Street in Barre, Vermont on January 20, 1986.

2. An investigation was immediately begun to attempt to locate the perpetrator and an investigative group consisting of Terry Trono, Washington County State's Attorney, Brent Curtis, Barre City Police Department, Ronald West, Washington County Sheriff, and Lawrence Dodge, Investigator with the Washington County State's Attorney's office. This group met frequently and the investigation was coordinated by its members.

3. The investigation very shortly focused on the defendant, Rick Preston. Preston had resided with the deceased and was missing. He became a principal suspect.

4. It became a major objective of the investigating team to question Preston. Information was released to the press indicating that Preston was not a suspect, in order that he not be deterred from talking to the investigating officers. The primary motive was to discourage flight.

5. On or about December 31, 1985 Rick Preston was cited to appear on a misdemeanor charge of simple assault. The citation was issued by Montpelier Police Officer Kent Goslant and arose out of an altercation on New Year's Eve between Rick Preston and Carmel Edson during which Rick Preston was alleged to have slapped Carmel Edson. This charge was not solicited by the State's Attorney or any other police agency in connection with the investigation of the Evans' homicide. The offense occurred in Montpelier.

6. The citation required Rick Preston to appear in the Vermont District Court in Barre on February 3, 1986.

7. Prior to February 3, 1986, the State's Attorney, Terry Trono, decided not to file the simple assault information, out of concern that an uninformed arresting agency could compromise the investigation.

8. Rick Preston did not appear for his arraignment on February 3, 1986.

9. During the following several days discussions were held by Terry Trono, Detective Curtis, Sheriff West, and Lawrence Dodge concerning the advisability of obtaining a warrant on the simple assault charge.

10. No probable cause existed to seek a warrant on the homicide.

11. By February 7, 1986 the investigating officers and Terry Trono concluded that Rick Preston had probably left the state and that the most effective way to find and

hold him for questioning was to obtain a warrant for his arrest on the simple assault charge.

12. On February 7, 1986 the information charging simple assault was filed and Lawrence Dodge filed a supplemental affidavit in support of the application for a warrant. Probable cause was found by Honorable Judge Cook, and a warrant was issued on February 7, 1986 for failure to appear on February 3, 1986.

13. It was the intention of the officers investigating the homicide to use the warrant which could be issued on the unrelated simple assault charge to locate, hold, and question Rick Preston concerning the murder of Frank Evans.

14. The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

15. Lawrence Dodge, Investigator for the State's Attorney, arranged to have a temporary wanted persons bulletin placed in the National Crime Information Center (NCIC) on February 7, 1986.

16. On that same day, at the request of Lawrence Dodge, a NCIC entry form for wanted persons was prepared. This form is the standard form which must be completed prior to any permanent entry for wanted persons being made in the NCIC.

17. The entry form advised, among other details, that Rick Preston was charged with simple assault, was considered dangerous, and armed with a knife.

18. Any persons locating Rick Preston were advised to contact Brent Curtis of the Barre City Police Department or the Washington County State's Attorney's office.

19. The request to hold was entered for the entire United States.

20. The warrant issued for the arrest of Rick Preston on a misdemeanor charge of simple assault would not have been entered on to the NCIC were it not for the desire of the investigating officers to locate and hold Rick Preston for questioning on the homicide.

21. The entry of this warrant into the NCIC was authorized by Terry Trono for the sole purpose of locating Rick Preston for questioning.

22. In 1985, 314 arrest warrants, in all categories, issued in Washington County. Only five were entered in the NCIC.

Dated at Barre in the County of Washington and State of Vermont this 25th day of July, 1986.

RUBIN, RONA, KIDNEY & MYER

By /s/ _____
RICHARD I. RUBIN
Defendant's Attorney

STATE OF VERMONT

By /s/ _____
TERRY TRONO

By /s/ _____
DAVID E. TARTTER
Attorneys for the State

/s/ _____
RICK PRESTON

APPENDIX E

WASHINGTON CIRCUIT
UNIT NO. 2

Docket Number 332-3-86 WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK PRESTON

MOTION TO SUPPRESS
CONTINUED
ON
AUGUST 14, 1986

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* * * *

[Questions by Defense Counsel. Answers by Respondent.]

[8] Q. You did go to court on Thursday afternoon?

A. Yes.

Q. Tell us about that?

A. Well, I was brought behind—in front of a lady judge that was there and she told me about what I was charged for and where it was from and she also asked me if I wanted a lawyer and, if not, if I would like a public defender.

Q. Had you filled out any papers before you went before the judge?

A. Yes, I did.

Q. And did those papers have anything to do with getting [9] a lawyer?

A. Yes, they did.

Q. And did you ask for a lawyer? In those papers?

A. Yes, I did.

Q. So when you went before the woman judge, did she ask you again whether you wanted a lawyer?

A. Yes, she did.

Q. And what did you tell her?

A. I said, yes, I would like one.

Q. Did you get to meet with a lawyer before you went before the judge?

A. No.

Q. Did you get to meet with a lawyer or with a lawyer standing next to you when you stood up in front of the judge?

A. No.

Q. After you left—got through being right in front of the judge, did you get to see a lawyer right there in the courtroom at any time?

A. No, I didn't.

Q. Did you expect that you would be able to see a lawyer at that time?

A. Yes.

Q. Why did you want a lawyer?

A. Well, the main reason was for someone to talk to and to give me some legal advice on the matter before I went up against [10] the judge.